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No. 76-1600

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

T. M. "JIM" PARHAM, Individually and as Commissioner of the Department of Human Resources, W. DOUGLAS SKELTON, Individually and as Director of the Division of Mental Health and W. T. SMITH, Individually and as Chief Medical Officer of Central State Hospital,

Appellants,

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v.

J. L. AND J. R., Minors, individually and as representatives of a class of persons similarly situated,

Appellees.

On Appeal from the United States District Court for the Middle District of Georgia

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BRIEF OF THE AMERICAN BAR ASSOCIATION AMICUS CURIAE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	III
INTEREST OF AMICUS CURIAE	1
QUESTION PRESENTED BY AMICUS	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
1. Placement in a mental institution is a constitutionally significant deprivation of liberty and carries with it other serious and important adverse consequences	7
2. Confinement in a mental institution cannot be constitutionally imposed by the state or under the authority of state law without adequate procedural safeguards	12
A. The District Court properly recognized that juveniles facing confinement in a mental institution are entitled to notice and to counsel	15
B. The right to counsel, in particular, has been emphasized by the American Bar Association as a matter of sound judicial administration	17
C. The District Court was correct in finding that the stricken Georgia Code provisions for admission or commitment of children do not satisfy the requirements enumerated above	19
D. The labeling of juvenile mental disability commitments as civil (rather than criminal), benevolent, or voluntary does not affect the applicability of the due process clause	21

TABLE OF CONTENTS—Continued

	Page
E. The imposition of due process protections upon the institutionalization decision is necessitated both by the risk of erroneous psychiatric and other judgments and by the need to ensure that less restrictive alternatives are adequately explored	21
3. Children facing commitment on mental disability grounds are entitled to substantially the same procedural protections afforded adults under the due process clause	24
A. The decisions of this Court indicate that parental authority is not without limits, and that children, as well as adults, are entitled to constitutional protections	25
B. This Court's abortion decisions reflect the proper balancing of interests to be applied in the instant case	26
C. The District Court properly accommodated the interests of the parent and child in requiring due process safeguards	28
D. It cannot be assumed that parents, faced with legitimate familial problems, will always act in the best interest of their children with regard to commitment to a mental institution	29
E. Claims of alleged traumatizing or disruptive effects of due process protections for children are not supported by the record	31
Conclusion	32

TABLE OF AUTHORITIES

Cases:	Page
Arnett v. *Kennedy*, 416 U.S. 134 (1974)	7
In re Ballay, 482 F.2d 648 (D.C. Cir. 1973)	11, 20
Bartley v. *Kremens*, 402 F.Supp. 1039 (E.D. Pa. 1975), *rev'd on other grounds* —— U.S. ——, 97 S.Ct. 1709 (1977)	15
Baxstrom v. *Herold*, 383 U.S. 107 (1966)	7
Bell v. *Burson*, 402 U.S. 535 (1971)	12
Bell v. *Wayne County*, 384 F.Supp. 1085 (E.D. Mich. 1974)	14, 15
Bellotti v. *Baird*, 428 U.S. 132 (1976)	26, 29
Board of Regents v. *Roth*, 408 U.S. 564 (1972)	11
Boddie v. *Connecticut*, 401 U.S. 371 (1971)	12
Breed v. *Jones*, 421 U.S. 519 (1975)	21, 26
Cafeteria Workers Union v. *McElroy*, 367 U.S. 886 (1961)	12
In re Coleman, Cir. Ct. No. 76-639-949 AV (Cir. Ct. Wayne County Mich., Feb. 23, 1977)	11
Covington v. *Harris*, 419 F.2d 617 (D.C. Cir. 1969)	23
Davis v. *Watkins*, 384 F.Supp. 1196 (N.D. Ohio 1974)	11
Denton v. *Commonwealth*, 383 S.W. 2d 681 (Ky. 1964)	14
Dixon v. *Attorney General of the Commonwealth of Pennsylvania*, 325 F.Supp. 966 (M.D. Pa. 1971)	14
Dixon v. *Weinberger*, 405 F.Supp. 974 (D.D.C. 1975)	23
Doremus v. *Farrell*, 407 F.Supp. 509 (D. Neb. 1975)	14, 15
In re Gault, 387 U.S. 1 (1967)	8, 11, 14, 21, 26
Ginsberg v. *New York*, 390 U.S. 629 (1968)	25
Goldberg v. *Kelly*, 397 U.S. 254 (1970)	12
Goldy v. *Beal*, 429 F.Supp. 640 (M.D. Pa. 1976)	14
Goss v. *Lopez*, 419 U.S. 565 (1975)	10, 11, 26
Greenwood v. *United States*, 350 U.S. 366 (1956)	22
Griswold v. *Connecticut*, 381 U.S. 479 (1965)	10
Heryford v. *Parker*, 396 F.2d 393 (10th Cir. 1968)	15, 21, 30

TABLE OF AUTHORITIES—Continued

Page

Horacek v. *Exon*, 354 F.Supp. 71 (D. Neb. 1973), *order on consent* No. 72-L-299 (D. Neb., Oct. 31, 1975) 11, 30
Humphrey v. *Cady*, 405 U.S. 504 (1972) 7
Ingraham v. *Wright*, —— U.S. ——, 97 S.Ct. 1401 (1977) 13, 26
J.L. and J.R. v. *Parham*, 412 F.Supp. 112 (M.D. Ga. 1976) ..... *passim*
Kaimowitz v. *Michigan Department of Mental Health*, No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973) 10
Kendall v. *True*, 391 F.Supp. 413 (W.D. Ky. 1975) .. 14
Kent v. *United States*, 401 F.2d 408 (D.C. Cir. 1968) 30
Kidd v. *Schmidt*, 399 F.Supp. 301 (E.D. Wis. 1975) 15
Knecht v. *Gillman*, 488 F.2d 1136 (8th Cir. 1973) .. 9
Lake v. *Cameron*, 364 F.2d 657 (D.C. Cir. 1966) 23
Lessard v. *Schmidt*, 349 F.Supp. 1078 (E.D. Wis. 1972), *vacated on procedural grounds* 414 U.S. 473 (1974), *on remand* 379 F.Supp. 1376 (E.D. Wis. 1974), *vacated on procedural grounds* 421 U.S. 957 (1975), *on remand* 413 F.Supp. 1318 (E.D. Wis. 1976) 10, 14, 15, 23
In re Long, 25 N.C. App. 702, 214 S.E. 2d 626 (1975) 7, 30
Lynch v. *Baxley*, 386 F.Supp. 378 (M.D.Ala. 1974) 14, 15, 23
Mackey v. *Procunier*, 477 F.2d 877 (9th Cir. 1973) .. 9, 10
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 25
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 12
Nelson v. *Hudspeth*, C.A. No. J75-40(R) (S.D. Miss., May 16, 1977) 10

TABLE OF AUTHORITIES—Continued

Page

New York State Association for Retarded Children and Parisi v. *Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973), *modified* No. 72-C-356/357 (E.D.N.Y., May 23, 1973), *order on consent sub nom. New York State Association for Retarded Children and Parisi* v. *Carey*, No. 72-C-356/357 (E.D.N.Y., April 30, 1975), *approved* 393 F. Supp. 715 (E.D.N.Y. 1975) 11, 23, 30
O'Connor v. *Donaldson*, 422 U.S. 563 (1975) 8, 11, 14, 22, 23, 24
Paul v. *Davis*, 424 U.S. 693 (1976) 11
People v. *Burnick*, 14 Cal. 3d 306, 121 Cal. Rptr. 488 (1975) 20
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) .. 25
Pima County Public Fiduciary v. *Superior Court*, 546 P.2d 354 (Ariz. Ct. App. 1976) 15
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976) 26, 27, 28, 29, 31
Price v. *Sheppard*, 239 N.W. 2d 905 (Minn. 1876) .. 10
Prince v. *Massachusetts*, 321 U.S. 158 (1944) 26
Rochin v. *California*, 342 U.S. 165 (1952) 9
Roe v. *Wade*, 410 U.S. 113 (1973) 10, 26
In re Roger S., Crim. 19558 (Cal. July 18, 1977) .. 10, 15, 20
Romeo v. *Youngberg*, C.A. No. 76-3429 (E.D. Pa., June 6, 1977) 11
Saville v. *Treadway*, 404 F.Supp. 430 (M.D. Tenn. 1974) 15, 30
Schmerber v. *California*, 384 U.S. 757 (1966) 9
Scott v. *Plante*, 532 F.2d 939 (3rd Cir. 1976) 9
Shelton v. *Tucker*, 364 U.S. 479 (1960) 23
In re Sippy, 97 A.2d 455 (D.C. Mun. App. 1953) .. 30
Smith v. *Organization of Foster Families for Equality and Reform*, —— U.S. ——, 97 S.Ct. 2094 (1977) 13
Souder v. *McGuire*, 423 F.Supp. 830 (M.D. Pa. 1976) 9
Specht v. *Patterson*, 386 U.S. 605 (1967) 18, 21

TABLE OF AUTHORITIES—Continued

	Page
Stamus v. *Leonhardt*, 414 F.Supp. 439 (S.D. Iowa 1976)	14
State ex rel. Hawks v. *Lazaro*, 202 S.E. 2d 109 (W. Va. 1974)	14
Suzuki v. *Quisenberry*, 411 F.Supp. 1113 (D. Hawaii 1976)	14, 15
Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969)	26
Vanderzeil v. *Hudspeth*, C.A. No. J76-262(R) (S.D. Miss., Feb. 11, 1977)	11
Welsch v. *Likins*, 373 F.Supp. 487 (D. Minn. 1974), *enforced* No. 4-72-Civ. 451 (D.Minn., Oct. 1, 1974) *aff'd in part* Nos. 76-1473 and 76-1797 (8th Cir., March 9, 1977)	11, 23
Wheeler v. *Glass*, 473 F.2d 983 (7th Cir. 1973)	11
In re Winship, 397 U.S. 358 (1970)	7, 14, 26
Winters v. *Miller*, 446 F.2d 65 (2nd Cir. 1971), *cert. den.* 404 U.S. 985 (1971)	9
Wisconsin v. *Constantineau*, 400 U.S. 433 (1971)	11
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)	25
Wolff v. *McDonnell*, 418 U.S. 539 (1974)	12
Wyatt v. *Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971), 334 F.Supp. 1341 (M.D. Ala. 1971), 344 F.Supp. 373 and 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974)	11, 12, 23
Wyatt v. *Hardin*, No. 3195-N (M.D. Ala., February 28, 1975, June 26, 1975, and July 1, 1975)	9, 10

Constitution:

First Amendment	25
Fourteenth Amendment	*passim*

Statutes:

28 U.S.C. § 1253	5
28 U.S.C. § 1343(3)	3
28 U.S.C. § 2281	3

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 2284	3
42 U.S.C. § 1983	3
21 D.C. Code §§ 501 *ff.* (1964 Hospitalization of the Mentally Ill Act)	23
Ga. Code Ann. §§ 88-503.1(a)	3, 4, 19
Ga. Act No. 331 (March 23, 1977)	19, 20
1971 Ga. Law 709, Ga. Juvenile Court Code Title 24A	5

Regulations:

45 C.F.R. § 249.10(b)(16)(iii)	24
45 C.F.R. § 249.13(a)(2)(iv)	24

Miscellaneous:

ABA Comm. on Standards of Judicial Admin., *Standards Relating to Trial Courts*, §§ 2.20, 2.72	17, 18
Barton, *Institutional Neurosis* (2d ed. 1966)	12
Comment, "Developments in the Law—Civil Commitment of the Mentally Ill," 87 Harv. L. Rev. 1190 (1974)	10
Department of Health, Education and Welfare, National Center for Child Abuse and Neglect, "Child Abuse and Neglect Statistical Information Sheet"	29
"Due Process Limitations on Parental Rights to Commit Children to Mental Institutions," 48 U. Colo. L. Rev. 235 (1977)	8
Ellis, "Volunteering Children: Parental Commitment of Minors to Mental Institutions," 62 Calif. L. Rev. 840 (1974)	22
Ennis & Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Calif. L. Rev. 693 (1974)	20, 22
Friedman, "Legal Regulation of Applied Behavioral Analysis in Mental Institutions and Prisons," 17 Ariz. L. Rev. 39 (1975)	10

TABLE OF AUTHORITIES—Continued

	Page
Glenn, "The Least Restrictive Alternative in Residential Care and the Principle of Normalization," in *The Mentally Retarded Citizen and the Law*, (1976)	9, 24
Goffman, *Asylums* (1961)	12
Goldstein, Solnit & Freud, *Beyond the Best Interest of the Child*, (1973)	9
Gruenberg, "The Social Breakdown Syndrome—Some Origins," 123 Am. J. Psychiatry 12 (1967)	12
Hobbs (ed.), *Issues in the Classification of Children* (1975)	9
IJA-ABA, *Standards Relating to Counsel for Private Parties* (Tent. Draft, 1977)	18
Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Psychiatric Facilities Serving Children and Adolescents* (1974)	24
Joint Commission on the Mental Health of Children, *Crisis in Child Mental Health: Challenge for the 1970's* (1970)	9
"Minors' Right to Due Process: Does it Extend to Commitment to Mental Institutions?" 52 Notre Dame Law. 136, (1976)	9, 11, 16, 30
Panneton, "Children, Commitment and Consent: A Constitutional Crisis," 10 Family L.Q. 295 (1977)	13, 14
Provence & Lipton, *Infants in Institutions* (1962)	9
Rosenhan, "On Being Sane in Insane Places," 113 Santa Clara L. Rev. 379 (1973)	22
Shah, "Dangerousness: Some Definitional, Conceptual, and Public Policy Issues," in *Perspectives in Law and Psychology* (B. Sales ed. 1977)	22
Shah, "Some Interactions of Law and Mental Health in the Handling of Social Deviance," 23 Catholic U.L. Rev. 647 (1974)	22
Wolfensberger, *The Principle of Normalization in Human Services* (1972)	24

IN THE

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OCTOBER TERM, 1977

No. 75-1690

T. M. "JIM" PARHAM, Individually and as Commissioner of the Department of Human Resources, W. DOUGLAS SKELTON, Individually and as Director of the Division of Mental Health and W. T. SMITH, Individually and as Chief Medical Officer of Central State Hospital,

Appellants,

v.

J. L. AND J. R., Minors, individually and as representatives of a class of persons similarly situated,

Appellees.

On Appeal from the United States District Court for the Middle District of Georgia

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BRIEF OF THE AMERICAN BAR ASSOCIATION AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American Bar Association is a national membership organization of the legal profession. It counts as

members more than 220,000 lawyers from all states and has, since 1944, maintained an active interest in the field of mental disability law.[1] This interest was intensified in 1973 when the Board of Governors of the American Bar Association established a Commission on the Mentally Disabled, a 17-member interdisciplinary body charged with promoting effective legal assistance to the mentally disabled, and with recommending and implementing programs designed to correct pervasive deficiencies in the nation's mental disability system. Since its inception, the Commission on the Mentally Disabled has focused its efforts toward, *inter alia*: mobilizing, activating, and awarding grants to local and state bar associations to encourage legal representation of the mentally disabled (including appropriate substantive technical assistance); establishing and publishing the *Mental Disability Law Reporter* (hereafter MDLR), an interdisciplinary journal which reports significant developments in the mental disability law field; operating a model in-house patient advocacy project at Norristown State Hospital (Pennsylvania); and developing model legislation to secure rights and services for the developmentally disabled.

The Association has taken the lead in establishing standards for the administration of justice, such as its Standards for the Administration of Criminal Justice and its Standards Relating to Trial Courts (see part 2B, *infra*). The Association has also recently completed a 23 volume tentative draft of juvenile justice standards.

[1] The Association established a Special Committee on the Rights of the Mentally Ill 33 years ago; this committee's recommendations led ultimately to the publication of a number of path-breaking studies by the American Bar Foundation, created by the Association in 1952. See Lindman & McIntyre, *The Mentally Disabled and the Law* (1961); Rock, Jacobson, & Janopaul, *Hospitalization and Discharge of the Mentally Ill* (1968); Matthews, *Mental Disability and the Criminal Law* (1970); Brakel & Rock, *The Mentally Disabled and the Law* (rev. ed. 1971).

Thus, the Association is uniquely experienced and interested in the question now before the Court.

With due consideration of the extended factual legal analysis offered in the briefs of the parties and other *amici*, the Association, with the written consent of the parties,[2] sets forth its views herein on the important question of whether, and to what extent, the Constitution requires procedural safeguards for minors facing civil commitment on the basis of alleged mental disability.

QUESTION PRESENTED BY AMICUS

Whether the due process clause of the Fourteenth Amendment applies to the nominally voluntary but in fact involuntary civil commitment of children on the basis of alleged mental disability, and if so, whether due process requires substantially the same procedural protections for such children as it does for adults?

STATEMENT OF THE CASE

On October 10, 1975, J. L. and J. R., patients in Georgia's Central State Hospital at Milledgeville, filed this class action pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 in the United States District Court for the Middle District of Georgia. A three-judge court was sought and convened pursuant to 28 U.S.C. §§ 2281 and 2284. The action was brought against the Commissioner of the Department of Human Resources, the Director of the Division of Mental Health, and the Chief Medical Officer of Central State Hospital on behalf of all mentally ill children (younger than 18 years of age) indefinitely admitted or committed to mental institutions under Ga. Code Ann. § 88-503.1(a).

[2] A copy of the joint letter indicating the parties' consent has been filed with the Clerk of the Court.

The minor plaintiffs alleged that the Georgia statutory procedure constituted a denial of due process of law under the Fourteenth Amendment to the United States Constitution. The challenged Georgia statute provides that children may be "voluntarily" institutionalized for extended care and treatment without opportunity for a hearing or assistance of counsel, upon a parent's or guardian's application, and the facility superintendent's finding that the child has "evidence of mental illness and . . . [is] suitable for treatment." Admission for observation and diagnosis requires merely parental application.

On February 26, 1976, the District Court ruled on due process grounds that the voluntary admission and commitment procedures of Ga. Code Ann. § 88-503.1(a) were unconstitutional as applied to children under 18 years of age. *J. L. and J. R.* v. *Parham*, 412 F. Supp. 112, 139 (M.D. Ga. 1976). Central to the court's holding was its determination that due process "necessarily includes procedural safeguards to see that even parents do not use the power to indefinitely hospitalize children in an arbitrary manner." 412 F. Supp. at 138.

The District Court specifically rejected defendants' argument that due process protections should not apply because the state is acting as *parens patriae* and not as an adversary in the admission/commitment of children (412 F.Supp. at 137-38), and because the admission/commitment proceedings are civil, not criminal, in nature. 412 F.Supp. at 137. The court held that defendants' reasoning ignored the fact that the child in question is not merely bodily restrained, but is denied the freedom "of an ordinary, every-day child in these United States of America" to be "a normal child in a normal household cared for by normal parents"; ignores the possibility of social ostracism and severe emotional and psychic harm resulting from commitment; and ignores the fact that some parents abuse their parental authority

by abandoning their children to the state under the guise of a mental hospital admission. 412 F.Supp. at 136-138.

The procedural regularity called for by due process, the court stressed, is flexible and such as the particular situation demands, and traditionally includes "at least the right after notice to be heard before an impartial tribunal." 412 F.Supp. at 137. The District Court ruled however, that the statute supplied "absolutely no due process" (412 F.Supp. at 139), and therefore violated the Fourteenth Amendment. It then ordered defendants either "to commence [as to every child under eighteen years of age in their custody] proceedings under Georgia's Juvenile Court Act or other mental health laws not found unconstitutional" or else "to completely remove the child from the custody of the defendants" (412 F.Supp. at 140), and permanently enjoined and restrained defendants from further detaining children under 18 years of age under the statute. *Id.*

While the court did not enumerate specific procedural guarantees, it did endorse existing Georgia juvenile court procedures[3] which require that any child alleged to be in need of treatment or commitment as mentally ill or mentally retarded be provided notice of a hearing, right to counsel (including appointed counsel where undue financial hardship exists), and recordation of the hearing.

The defendants appealed the judgment of the District Court to this Court pursuant to 28 U.S.C. § 1253, and made application for a stay pending appeal. A stay was denied by the trial court, but was subsequently granted

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[3] 1971 Ga. Laws 709, Ga. Juvenile Court Code Title 24A provides that the juvenile courts "shall have exclusive original jurisdiction over juvenile matters and shall be the sole court for initiating action: (1) Concerning any child . . . alleged to be in need of treatment or commitment as a mentally ill or mentally retarded child. . . ." 412 F.Supp. at 131. Subsequent to the decision below, the Georgia Assembly recited recognition of the juvenile courts' primary jurisdiction. See footnote 17, *infra*.

by this Court on April 5, 1976. Probable jurisdiction was noted by this Court on May 31, 1977.

SUMMARY OF ARGUMENT

Civil commitment of an individual on grounds of alleged mental illness is a constitutionally significant deprivation of personal liberty which carries with it serious adverse consequences and disabilities. Such deprivations and disabilities may not constitutionally be imposed without adequate procedural safeguards where the commitment of the individual is involuntary, in fact or in law. Fact finding procedures are particularly important where, as here, the risk of error is substantial, and where, as here, identification of appropriate less restrictive alternatives may obviate the need for commitment to a mental institution.

The asserted interest of the state in providing treatment to mentally disabled juveniles and in preserving the family unit does not justify a substantially different or less stringent application of the due process clause when committing juveniles on mental disability grounds than when committing adults on such grounds. While parents, of course, can and should be involved in any decision to institutionalize a child, it cannot be assumed in every case that the parent is acting in the best interest of the child. Thus the final commitment decision should be made, pursuant to appropriate procedures, by an objective and unbiased tribunal.

ARGUMENT

1. Placement in a Mental Institution Is a Constitutionally Significant Deprivation of Liberty and Carries With It Other Serious and Important Adverse Consequences.

Loss of liberty. Commitment to a mental institution necessarily entails a "massive curtailment of liberty," *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972), and inevitably affects "fundamental rights." *Baxstrom* v. *Herold*, 383 U.S. 107, 113 (1966). Perhaps the most basic aspect of constitutional liberty is the right to be free from unwarranted physical confinement. *Arnett* v. *Kennedy*, 416 U.S. 134, 157 (1974). Avoiding extreme restrictions on personal liberty such as those imposed by involuntary civil commitment has been held by this Court to be an interest of "transcending value." *In re Winship*, 397 U.S. 358, 364 (1970).

Although there may be differences between the involuntary commitment of an adult, where the state may assume a more active role, and the commitment of a minor, in which the parents are more directly involved,[4]

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[4] As of 1976 the following states had voluntary commitment statutes allowing parents or guardians to commit minors: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada (due process rights, including right to counsel and a hearing, are not forfeited when children are admitted by their parents), New Jersey (modified by state Supreme Court rule November 12, 1974), New Mexico (repealed and replaced by H.R. 472 (April 8, 1977)), New York (minor may effect his own release), North Carolina (statute declared unconstitutional in *In re Long*, 25 N.C. App. 702, 214 S.E.2d 626 (1975)), North Dakota, Ohio, Oklahoma, Oregon, South Carolina (minor under age 16 may apply for his own release), Tennessee (child may apply for his own release), Utah, Virginia, Washington (consent of minor over age 13 required), West Virginia (minor age 12 and over may apply for his own release), Wisconsin (consent of minor over age 13 required), and Wyoming.

[Footnote continued on page 8]

the results in terms of physical and emotional deprivations are, if different in kind, at least equal in impact and severity.[5] Adults and children alike are deprived of their basic right to personal liberty; all are removed from their homes, communities, and normal daily activities, and are subjected to the custody and control of persons (usually agents of the state) not of their own choosing.

The commitment of a minor to an institution is a traumatizing disruption of his life which cannot fail to have far-reaching consequences. A committed child is separated from a known environment of family, friends, and school and plunged into a frightening, unfamiliar world. See *In re Gault*, 387 U.S. 1, 27 (1967). As one expert witness testified below:

> [I]t seems to [me] the hospitalization . . . [is] really . . . like a sentence of death [A. 803] . . . . I think that this is one of the frightening aspects of hospitalization, that once the child is put behind doors, he is forgotten, . . . and that trauma at that point is really followed by the trauma that perhaps nobody else will care for him, and no matter how therapeutic the hospital may be, some link to the outside world still would be very important to have. A. 810.

[4] [Continued]

The following states had no age distinction in their voluntary commitment statutes: Iowa, Louisiana, Idaho (but if a parent admits a minor, consent of the parent is required for release), Minnesota, Nebraska, and Rhode Island. A child's consent is required in Delaware, Maine, Montana, and Texas. Alabama considers commitment of a child by his parents to be involuntary commitment. New Hampshire and Vermont specifically exclude children from voluntary commitment precedures. South Dakota has no voluntary commitment statute. "Due Process Limitations on Parental Rights to Commit Children to Mental Institutions," 48 U. Colo. L. Rev. 235, 236 (1977).

[5] Parental or familial involvement is not uncommon in the civil commitment of adults. See *O'Connor* v. *Donaldson*, 422 U.S. 563, 565 (1975), where the petitioner was committed at the instance of his parents and spent 15 years in the Florida State Hospital for the mentally ill.

Testimony in this case further established the difficulty of subsequent reintegration of the child into his once familiar world (A. 176-177). See also, A. 904; "Minors' Right to Due Process: Does it Extend to Commitment to Mental Institutions?" 52 Notre Dame Law. 136, 140 (1976). The feeling of abandonment occasioned by institutionalization is especially intense for younger children who are adversely affected by such feelings sooner than other children. Goldstein, Solnit & Freud, *Beyond the Best Interest of the Child*, 40-49 (1973). Institutionalization may also retard the normal intellectual and emotional development of a child.[6] Thus there is no reason to assume that the institutionalization decision, and the fact of institutionalization, are of any less consequence for minors than for adults (A. 177-178). If anything, the opposite appears to be the case.

Involuntary treatment. In addition to the deprivation of liberty inherent in an indefinite commitment, such commitment carries with it the risk of physically intrusive treatment which, especially if unwarranted, may violate the committed individual's right to bodily integrity. See *Schmerber* v. *California*, 384 U.S. 757, 772 (1966); *Rochin* v. *California*, 342 U.S. 165 (1952). Such treatment modalities may include forced administration of psychotropic medication, see *Winters* v. *Miller*, 446 F.2d 65 (2nd Cir. 1971), *cert. den.* 404 U.S. 985 (1971); *Scott* v. *Plante*, 532 F. 2d 939 (3rd Cir. 1976); *Souder* v. *McGuire*, 423 F.Supp. 830 (M.D. Pa. 1976); aversive conditioning, see *Knecht* v. *Gillman*, 488 F.2d 1136 (8th Cir. 1973); *Mackey* v. *Procunier*, 477 F.2d 877 (9th Cir. 1973); *Wyatt* v. *Hardin*, No. 3195-N (M.D. Ala.,

[6] Glenn, "The Least Restrictive Alternative in Residential Care and the Principle of Normalization," in *The Mentally Retarded Citizen and the Law*, at 499-501 (1976); Hobbs (ed.), *Issues in the Classification of Children*, at 135, 142-143 (1975); Joint Commission on the Mental Health of Children, *Crisis in Child Mental Health: Challenge for the 1970's*, at 321-324, 330-331 (1970); Provence & Lipton, *Infants in Institutions*, at 19 (1962).

February 28, 1975, June 26, 1975, and July 1, 1975), 1 MDLR 55; convulsive therapy, see *Wyatt* v. *Hardin*, *supra*, *Price* v. *Sheppard*, 239 N.W. 2d 905 (Minn. 1976), 1 MDLR 120; *Nelson* v. *Hudspeth*, C.A. No. J75-40(R) (S.D. Miss., May 16, 1977); and even psychosurgery, see *Kaimowitz* v. *Michigan Department of Mental Health*, No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973), 1 MDLR 147.[7]

Of course, not every institutionalized minor will be subjected to hazardous or intrusive procedures, but the fact is that institutionalization, to some degree, confers upon the state the power to impose treatment upon an institutionalized individual—treatment which by its very nature may involve "impermissible tinkering with mental processes," *Mackey* v. *Procunier*, *supra*, 477 F.2d at 877, or a violation of the right of privacy. See *Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Obviously, no one, especially a child, should be exposed to the risk of such treatment without a prior determination that it is warranted and appropriate.

Stigmatization. As courts have noted,[8] institutionalization on mental disability grounds almost inevitably stigmatizes the individuals involved in a way that adversely affects them the rest of their lives. Such stigmatization may result in or be accompanied by the scorn or obloquy of one's peers, loss of employment possibilities and education benefits, and other civil disabilities (A. 784).[9] In

[7] See generally Friedman, "Legal Regulation of Applied Behavioral Analysis in Mental Institutions and Prisons," 17 Ariz. L. Rev. 39 (1975).

[8] E.g., *Lessard* v. *Schmidt*, 349 F.Supp. 1078, 1088-90 (E.D. Wis. 1972), *vacated on procedural grounds* 414 U.S. 473 (1974), *on remand* 379 F.Supp. 1376 (E.D. Wis. 1974), *vacated on procedural grounds* 421 U.S. 957 (1975), *on remand* 413 F.Supp. 1318 (E.D. Wis. 1976); *In re Roger S.*, Crim. 19558, slip op. at 7 (Cal., July 18, 1977).

[9] Cf. Comment, "Developments in the Law—Civil Commitment of the Mentally Ill," 87 Harv. L. Rev. 1190, 1198-1201 (1974); *Goss*

these circumstances, see *Paul* v. *Davis*, 424 U.S. 693, 701-705 (1976), an individual's interest in his good reputation is a liberty (or property) interest entitled to constitutional protection. *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971).

Possibility of inhumane or inadequate treatment. It is unfortunate but true that many of our nation's public mental institutions do not provide minimally adequate habilitative or rehabilitative programming, but in fact may subject their patients or residents to inhumane and unsafe living conditions, destructive psychological pressures, and even physical abuse by other patients or residents or by staff members, all in violation of constitutional guarantees. As in *In re Gault*, *supra*, 387 U.S. at 15-21, this Court should take note of such possibility, which has been well documented by lower Federal courts,[10]

v. *Lopez*, 419 U.S. 565, 579 (1975) "[Charges of misconduct] could seriously damage the students' standing with their fellow pupils and teachers as well as interfere with later opportunities for higher education and employment [footnote omitted]." *In re Ballay*, 482 F.2d 648, 667-669 (D.C. Cir. 1973). *In re Coleman*, Cir. Ct. No. 76-639-949 AV (Cir. Ct. Wayne County, Mich., Feb. 23, 1977). See also, "Minors' Right to Due Process," *supra*, 52 Notre Dame Law. at 140.

[10] E.g., *O'Connor* v. *Donaldson*, *supra*; *Wheeler* v. *Glass*, 473 F.2d 983 (7th Cir. 1973); *Davis* v. *Watkins*, 384 F.Supp. 1196 (N.D. Ohio 1974); *Welsch* v. *Likins*, 373 F.Supp. 487 (D. Minn. 1974), *enforced* No. 4-72-Civ. 451 (D. Minn., October 1, 1974), 1 MDLR 193, *aff'd in part* Nos. 76-1473 and 76-1797 (8th Cir., March 9, 1977), 1 MDLR 334; *New York State Association for Retarded Children and Parisi* v. *Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973), *modified* No. 72-C-356/357 (E.D.N.Y., May 23, 1973), *order on consent sub nom. New York State Association for Retarded Children and Parisi* v. *Carey*, No. 72-C-356/357 (E.D.N.Y., April 30, 1975), *approved* 393 F.Supp. 715 (E.D.N.Y. 1975), 1 MDLR 58; *Romeo Youngberg*, C.A. No. 76-3429 (E.D. Pa., June 6, 1977); *Vanderzeil* v. *Hudspeth*, C.A. No. J76-262(R) (S.D. Miss., Feb. 11, 1977); *Horacek* v. *Exon*, 354 F.Supp. 71 (D. Neb. 1973), *order on consent* No. 72-L-299 (D. Neb., October 31, 1975); *Wyatt* v. *Stick-*

in determining the procedural protections which should attend the commitment of anyone, especially a child, to a mental institution. In those jurisdictions where substandard conditions exist, the consequences of erroneous institutionalization decisions are especially grave.

As with all the other types of deprivations and adverse consequences cited in this part, no reason appears why such infringments of constitutionally protected rights are of any less consequence in the case of children than they are in the case of adults (A. 177-178).

2. Confinement in a Mental Institution Cannot Be Constitutionally Imposed by the State or Under the Authority of State Law Without Adequate Procedural Safeguards.

This Court has repeatedly determined that prior to a deprivation of a constitutionally protected interest, the due process clause demands that procedures be established to determine the necessity and legal justification for the proposed deprivation. This Court has adopted a flexible approach by tailoring the procedural requirements according to the weight of the competing individual and governmental or societal interests at stake. See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Morrissey* v. *Brewer*, 408 U.S. 471, 481-90 (1972); *Bell* v. *Burson*, 402 U.S. 535, 539-42 (1971); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254, 263-71 (1970); *Cafeteria Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961).[11]

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ney, 325 F.Supp. 781 (M.D. Ala. 1971), 334 F.Supp. 1341 (M.D. Ala. 1971), 344 F.Supp. 373 and 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974). *Cf. Gruenberg*, "The Social Breakdown Syndrome—Some Origins," 123 Am. J. Psychiatry 12 (1967); Barton, *Institutional Neurosis* (2d ed. 1966); Goffman, *Asylums* (1961).

[11] Defendants in their brief rely heavily upon two recent decisions of this Court to establish that Georgia's procedures comport with due process. See defendant's brief's pp. 28-43. However, both de-

While this Court has not ruled directly on the procedural requirements for civil mental disability commitments, it has mandated strict procedural safeguards in the analogous areas of quasi-criminal commitments, *Specht* v. *Patterson*, 386 U.S. 605 (1967), and institu-

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cisions, *Ingraham* v. *Wright*, —— U.S. ——, 97 S.Ct. 1401 (1977), and *Smith* v. *Organization of Foster Families for Equality and Reform*, —— U.S. ——, 97 S.Ct. 2094 (1977) (hereinafter cited as *OFFER*), are clearly distinguishable from the present case.

In *OFFER*, this Court, facing difficult and complex questions concerning the constitutional adequacy of the procedure protecting foster parents from removal of their foster children, found the New York system to comport with due process. Unlike the Georgia commitment procedures, the New York procedures included a 10-day advance notice of removal; an opportunity for a conference; an opportunity for judicial review; and in certain cases, a full administrative hearing with the right to judicial review. These procedures clearly offer more protection than the Georgia procedures, under which the named plaintiffs herein were institutionalized for six years without any hearing whatsoever.

Further, the nature of the interest in *OFFER* differs from that in the instant case. As this Court noted in *OFFER*, "the distinctive features of foster care are first, 'that it is care in a *family*, it is noninstitutional substitute care,' and second 'that it is for a *planned* period—either temporary or extended'" (97 S.Ct. 2099) (emphasis in original). Commitment of a child in Georgia to a mental hospital results in care in an *institutional* setting for an *indefinite* period. Thus, the two situations are not comparable.

In *Ingraham* v. *Wright*, this Court held that the infliction of reasonable corporal punishment on public school children by teachers could be accomplished without first resorting to an administrative hearing. This case is also distinguishable from the case at hand. First, there is a significant constitutional difference between paddling a child, and indefinitely committing him to a mental hospital.

Furthermore, as this Court noted in *Ingraham*:

> Were it not for the common law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of the traditional remedies for abuse, the case for requiring advanced procedural safeguards would be strong indeed. 97 S.Ct. 1414.

No readily apparent authority reveals an analogous common law privilege allowing a parent to commit a child to a state mental hospital. See, Panneton, "Children, Commitment and Consent: A

tionalization of juvenile delinquents, *e.g.*, *In re Winship*, *supra*; *In re Gault*, *supra*. Indeed, the Chief Justice noted in his concurring opinion in *O'Connor* v. *Donaldson*, *supra*, 422 U.S at 580, that

> [t]here can be no doubt that involuntary commitment to a mental institution, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. . . . Commitment must be justified on the basis of legitimate state interest, and the reason for committing a particular individual must be established in an appropriate proceeding. (Citations omitted.)

Numerous lower Federal courts, relying in part on the above-cited cases, have struck down civil commitment statutes found to be deficient in procedural safeguards. *Stamus* v. *Leonhardt*, 414 F.Supp. 439 (S.D. Iowa 1976); *Suzuki* v. *Quisenberry*, 411 F.Supp. 1113 (D. Hawaii 1976), 1 MDLR 46; *Goldy* v. *Beal*, 429 F.Supp. 640 (M.D. Pa. 1976), 1 MDLR 137; *Doremus* v. *Farrell*, 407 F.Supp. 509 (D. Neb. 1975); *Kendall* v. *True*, 391 F.Supp. 413 (W.D. Ky. 1975); *Lynch* v. *Baxley*, 386 F.Supp. 378 (M.D. Ala. 1974); *Bell* v. *Wayne County*, 384 F.Supp. 1085 (E.D. Mich. 1974); *Lessard* v. *Schmidt*, *supra*; *Dixon* v. *Attorney General of the Commonwealth of Pennsylvania*, 325 F.Supp. 966 (M.D. Pa. 1971). *Cf. State ex rel. Hawks* v. *Lazaro*, 202 S.E. 2d 109 (W. Va. 1974); *Denton* v. *Commonwealth*, 383 S.W. 2d 681 (Ky. 1964).

Constitutional Crisis," 10 Family L.Q. 295 (1977). Nor is an analogous remedy for abuse available to the inappropriately committed child (A. 789-790).

Thus, neither *OFFER* nor *Ingraham* diminish the district court's finding that children are entitled to due process protections when faced with the possibility of the grievous loss of liberty involved in an indefinite commitment to a state mental institution.

Indeed, many courts other than the District Court in the instant case have similarly held due process requirements to be specifically applicable to mental disability commitments of children. *Bartley* v. *Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975), *rev'd on other grounds* —— U.S. ——, 97 S.Ct. 1709 (1977); *In re Roger S.*, *supra*; *Saville* v. *Treadway*, 404 F.Supp. 430 (M.D. Tenn. 1974); *Kidd* v. *Schmidt*, 399 F.Supp. 301 (E.D. Wis. 1975). *Cf. Pima County Public Fiduciary* v. *Superior Court*, 546 P.2d 354 (Ariz. Ct. App. 1976).

A. The District Court Properly Recognized That Juveniles Facing Confinement in a Mental Institution are Entitled to Adequate Notice and to Counsel.

The lower court cases have concluded, in particular, that the requirements of due process include the right to meaningful notice given sufficiently in advance of any proceedings so as to apprise the individual of the grounds for the proposed commitment along with the procedural and substantive rights afforded him. *Suzuki* v. *Quisenberry*, *supra*, 411 F.Supp. at 1127; *Doremus* v. *Farrell*, *supra*, 407 F.Supp. at 515; *Lynch* v. *Baxley*, *supra*, 386 F.Supp. at 388; *Bell* v. *Wayne County*, *supra*, 384 F.Supp. at 1092; *Lessard* v. *Schmidt*, *supra*, 349 F.Supp. at 1092. In addition, lower court opinions have uniformly held that an individual faced with the prospect of involuntary commitment for an indefinite period is entitled to the effective assistance of counsel, including the appointment of counsel if the individual cannot afford retained counsel, and that counsel must be made available far enough in advance of any hearing to provide adequate opportunity for preparation. *Suzuki* v. *Quisenberry*, *supra*, 411 F. Supp. at 1129; *Doremus* v. *Farrell*, *supra*, 407 F.Supp. at 515; *Lynch* v. *Baxley*, *supra*, 386 F.Supp. at 389; *Bell* v. *Wayne County*, *supra*, 384 F.Supp. at 1093-94; *Lessard* v. *Schmidt*, *supra*, 349 F.Supp. at 1097-98. *Cf. Heryford* v. *Parker*, 396 F.2d 393, 396 (10th Cir. 1968).

In the instant case, the court below ordered due process proceedings to be commenced under statutory provisions not found to be unconstitutional, specifically mentioning the Georgia Juvenile Court Act which confers jurisdiction over any child "alleged to be in need of treatment or commitment as a mentally ill or mentally retarded child. . . ." 412 F.Supp. at 131. That act explicitly provides for notice of a hearing, right to counsel or appointed counsel (where financial hardship exists), and a recorded, nonjury hearing. The unique aspects of a juvenile mental disability commitment, where the child may in certain situations be more subject to implicit or explicit coercion (A. 903) and less likely to appreciate or comprehend the nature of the proceedings, are taken into account by ensuring these rights. Indeed, consultation with counsel may, in some cases, lead to dispensing with other formal procedures and would protect a child from unwarranted waiver of his rights.[12]

Supplementing the legal authority for the appointment of counsel[13] was expert testimony below which agreed that counsel played a beneficial role in the proceedings for all involved. The testimony indicated that the advocate for the child is perceived by the child as representing his interests in the commitment proceedings (A. 180). Despite assurances to the contrary from parents or the psychiatrists, the child is likely to perceive their role as adversarial. Appointment of counsel for the child thus

[12] Of course, it should be recognized that a hearing may not be held in every case. The experience of the New Jersey Department of the Public Advocate indicates that often juvenile commitment cases are concluded before a hearing is held. See Sec. I(c), Brief of Amicus, New Jersey Department of the Public Advocate.

[13] See also, "Minors' Right to Due Process," *supra*, 52 Notre Dame Law. at 142, 144, which advocates "[t]he appointment of *medical and legal* advocates . . . [as] an appropriate means of ensuring that the child's interests are given full judicial consideration" (at 144, emphasis added).

decreases the chance that the child will feel "railroaded" and makes him more amenable to treatment if commitment is ordered (A. 180-181, 183).

B. The Right to Counsel, in Particular, Has Been Emphasized by the American Bar Association as a Matter of Sound Judicial Administration.

Appointment of counsel along the lines of the lower court's order has been incorporated into the Standards Relating to Trial Courts drafted by the American Bar Association Commission on Standards of Judicial Administration and adopted by the Association's House of Delegates at its mid-year meeting in February, 1976. Section 2.72 of the trial court standards,[14] which sets forth the procedural requirements for civil commitment proceedings, specifically provides that persons subject to such proceedings are entitled to the assistance of counsel as provided in Section 2.20. That section, in addition to permitting a litigant to employ counsel in any judicial proceeding, requires that counsel be appointed for persons unable to afford their own counsel when they are "subject to a civil proceeding in which the result may be detention for a period longer than 72 hours."

In its commentary with regard to Section 2.20, the Commission on Standards of Judicial Administration noted:

> In addition to representation in criminal cases, counsel should be appointed to represent any person who is the subject of a civil proceeding in which the result may be his physical commitment or detention for any period beyond brief emergency detention. Such proceedings include commitment of the mentally ill, mentally deficient, narcotics addicts, alcoholics, "defective delinquents," "sexual psychopaths," and similarly defined persons. The distinc-

[14] The complete text of Section 2.72 and accompanying Commentary are attached as the appendix to this brief.

> tion between these procedures and criminal prosecution is often more theoretical than real, for the state plays an adversary role, as in criminal cases, and the consequence of adjudication may be long confinement—sometimes for an indefinite period—in an institution where the conditions of custody to a greater or lesser degree resemble a prison. A like necessity for counsel exists in deportation and contempt proceedings. Where the individual involved is mentally disturbed or deficient, or lacks facility in speaking English, the need for counsel is all the more urgent because the person cannot speak effectively for himself.

Clearly, the commitment of a minor falls within the type of situation contemplated by Standard 2.20.[15]

As previously developed, the court below implicitly required procedural rights other than counsel for children facing commitment, all of which find support in some or all of the authorities supporting *amicus*' arguments herein.[16] *Amicus* would point out also that Section 2.72 of the Association's trial court standards and the procedural safeguards required by the court below (i.e. Ga. Juvenile Court Code Title 24A) are very similar, in that both contemplate the right to notice, counsel, and personal presence at such hearings, along with the rights of con-

[15] The critical role of counsel for children is also discussed at length in draft standards relating to the juvenile justice system which were recently published by the Juvenile Justice Standards Project. The Project, a joint venture of the Institute of Judicial Administration and the American Bar Association, has produced a draft twenty-three volume series covering the entire field of juvenile justice administration. At present, the standards have not been approved by the American Bar Association, but are scheduled to be considered at the Association's 1978 mid-year meeting. IJA-ABA, Standards Relating to Counsel for Private Parties (Tent. Draft, 1977).

[16] The utility of particular procedural safeguards may vary to some extent depending on the age and maturity of the child involved.

frontation, cross-examination, and presenting evidence on one's own behalf.

C. The District Court Was Correct in Finding That the Stricken Georgia Code Provisions for Admission or Commitment of Children Do Not Satisfy the Requirements Enumerated Above.

A plain reading of the Georgia statute here in question, Ga. Code Ann. § 88-503.1(a), demonstrates that it affords children subject to institutionalization none of the procedural protections mandated by the above-cited constitutional decisions or endorsed by the American Bar Association.[17] The fact that the state's custom is to screen

[17] Shortly before this Court noted probable jurisdiction herein, Georgia enacted alternate procedures for admitting minors which are "cumulative and . . . not to be used in lieu of present methods of providing treatment for mentally ill children either under this Title or under Code Chapters 88-4, 88-5, and 88-25, but . . . [are] only to be used in the event that these other methods are not available." Act No. 331 (March 23, 1977).

The alternate statute allows any legal custodian (or physical custodian if the legal custodian cannot be contacted) to initiate voluntary admission of his or her ward (under 17 years of age) to a mental health facility by bringing the ward to an emergency receiving facility for examination. Upon the examining physician's determination that the child is mentally ill or retarded, is in need of immediate medical assistance, and is in need of hospitalization, the child will be admitted to the facility. The statute requires that the child's parents or guardian be notified immediately of such admission, and that a petition be filed in juvenile court by the person seeking the child's hospitalization within 24 hours of such admission. A finding of probable cause at the juvenile court hearing required to be held within three days of the filing of the petition enables the hospital to confine the child until a full hearing on his mental status is held.

The full hearing must be held within ten days of the filing of the petition. Commitment is authorized only if the juvenile court judge, at the final hearing, determines that the child is mentally ill or mentally retarded and is in need of hospitalization. Otherwise, the petition must be dismissed and the child discharged from the facility. The order authorizing commitment is effective for six months, but may be extended. The statute prohibits hospitali-

children at a community mental health center and at the receiving facility does not cure this total lack of due process safeguards.[18] Even assuming that each case is screened by the best-intentioned psychiatrist, inappropriate commitments are possible.

> Psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession. It must be conceded that phychiatrists still experience considerable difficulty in confidently and accurately diagnosing mental illness. *People* v. *Burnick*, 14 Cal. 3d 306, at 326-27, 121 Cal. Rptr. 488, at 501 (1975).

See also *In re Ballay*, *supra*, 482 F.2d at 665; *In re Roger S.*, *supra*, slip op. at 7; Ennis & Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Calif. L. Rev. 693, 719 (1974); A. 171-172, 173-175, 792-793, 714, 805, 806. See also discussion of reliability of psychiatric judgement at pages 21-24, *infra*.

Expert testimony below corroborated the view that placing sole reliance on a psychiatric diagnosis, without recourse to review by an unbiased tribunal, will not suffice to prevent unnecessary or inappropriate commitments (A. 174-175, 808, 809).

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zation when treatment can be provided most appropriately in a less restrictive setting.

(The enactment also recites the General Assembly's recognition that the Juvenile Court may make disposition of mentally ill/retarded children under Code Section 24A-2601, and recognition that the Juvenile Court has primary jurisdiction over the commitment of juveniles who meet the criteria of Code Chapters 88-4, 88-5, and 88-25.)

[18] Indeed, the testimony of the Director of the Office of Child and Adolescent Mental Health Services, Atlanta Division, indicates not only that such practice is not mandatory (A. 757), but that it can be ignored entirely (A. 757-758). (See also defendants' brief, p. 3.) This same testimony further indicates that even at the state hospital level, no statewide regulations exist (A. 781-783) to ensure that every child receives even a uniformly minimum screening.

D. The Labeling of Juvenile Mental Disability Commitments As Civil (Rather Than Criminal), Benevolent, or Voluntary Does Not Affect the Applicability of the Due Process Clause.

This Court has long avoided the labeling of a particular proceeding as "civil" rather than "criminal" and has repeatedly imposed due process requirements when it was clear that the potential existed for serious deprivation of constitutionally protected interests. E.g., *Breed* v. *Jones*, 421 U.S. 519, 530 (1975); *In re Gault*, *supra*; *Specht* v. *Patterson*, *supra*; *cf. Heryford* v. *Parker*, *supra*, 396 F.2d at 396. The same deprivations threatened in these juvenile and quasi-criminal "civil" cases are present here, and the same reasoning should apply. This Court should affirm the District Court's rejection of the defendants' argument that the benevolent (habilitative or rehabilitative) purpose of juvenile mental disability commitments insulates them from due process requirements. See 412 F.Supp. at 137-138. The statutory characterization of these admissions and commitments as "voluntary" should not mask the fact that they are voluntary on the part of the parent (or other person or agency seeking institutionalization), but not on the part of the child being deprived of his liberty. Thus the requirements of due process should apply.

E. The Imposition of Due Process Protections Upon the Institutionalization Decision Is Necessitated Both by the Risk of Erroneous Psychiatric and Other Judgments and by the Need to Ensure That Less Restrictive Alternatives Are Adequately Explored.

The deprivations and consequences of institutionalization described in the first part of *amicus*' argument would, in themselves, require that institutionalization decisions made by or through the authority of the state be subject to the requirements of the due process clause. The special nature of the admission/commitment decision, however, demands the type of procedural safeguards man-

dated by the District Court for at least two further reasons—the uncertainty of psychiatric (and other) diagnoses, and the need, from both a professional and constitutional standpoint, to place an allegedly mentally disabled person in the least restrictive setting which will meet his treatment needs.

The Chief Justice has recently noted the "uncertainties" of diagnosis and therapy in the "baffling" field of psychiatry, and has observed, correctly, that "the reported cases are replete with evidence of the divergence of medical opinion in this vexing area." *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 579 (Burger, C.J., concurring). This Court has previously remarked upon "the uncertainty of diagnosis in this field and the tentativeness of professional judgment." *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956); *cf.* Ennis & Litwack, *supra*.

An admission/commitment hearing would serve to check this uncertainty. The pendency of a hearing would also dilute the tendency of some psychiatrists to overdiagnose or to err on the side of caution, assuming disease over health. See Ellis, "Volunteering Children: Parental Commitment of Minors to Mental Institutions," 62 Calif. L. Rev. 840, 865 (1974); Rosenhan, "On Being Sane in Insane Places;" 113 Santa Clara L. Rev. 379 (1973). Given the uncertainties in the field of mental disability, and the difficulty in relating psychiatric or psychological diagnoses to legal standards for commitment,[19] proper fact-finding procedures are a practical and constitutional necessity in the civil commitment process.

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[19] Shah, "Dangerousness: Some Definitional, Conceptual, and Public Policy Issues," in *Perspectives in Law and Psychology* (B. Sales ed. 1977); Shah, "Some Interactions of Law and Mental Health in the Handling of Social Deviance," 23 Catholic U.L. Rev. 647 (1974).

Moreover, it is no longer open to serious question that state-imposed deprivation of personal liberty for purposes of mental disability treatment, or any other such incursion on constitutionally protected liberties, must be only to the limited extent necessary to accomplish the legitimate purpose of the deprivation or limitation in question. *Shelton* v. *Tucker*, 364 U.S. 479, 488-490 (1960). Numerous lower Federal courts have recognized the applicability of this "least restrictive alternative" doctrine to commitment and treatment of the mentally disabled. *New York State Association for Retarded Children and Parisi* v. *Carey*, *supra*, Order of April 30, 1975, 1 MDLR 58; *Lynch* v. *Baxley*, *supra*, 386 F.Supp. at 392; *Welsch* v. *Likins*, *supra*, 373 F.Supp. at 501-502; *Lessard* v. *Schmidt*, *supra*, 349 F.Supp. at 1096; *Wyatt* v. *Stickney*, *supra*, 344 F.Supp. at 379, 396; *cf. Dixon* v. *Weinberger*, 405 F.Supp. 974 (D.D.C. 1975),[20] 1 MDLR 12; *Covington* v. *Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Lake* v. *Cameron*, 364 F.2d 657 (D.C. Cir. 1966). Indeed, this Court has specifically applied this rationale to mental disability commitments in *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 575:

> "May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him

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[20] In this case, based on the 1964 Hospitalization of the Mentally Ill Act, 21 D.C. Code §§ 501*ff*., the District Court, in endorsing the least restrictive approach to both commitment and treatment, found, not only that some patients in the District of Columbia mental hospital could fare as well in the community, but also that the treatment needs of 43% of the patients *required* them to be in the community. 405 F.Supp. at 976.

> from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom on their own or with the help of family or friends. See *Shelton* v. *Tucker*, 364 U.S. 479, 488-490."

Expert testimony in this case (A. 180) and the professional literature[21] are in accord with the foregoing legal analysis.[22] Thus, perhaps the most vital function of procedures such as those required by the court below is to prod the parents, professionals, and others involved in the admission/commitment process to avoid unnecessary and inappropriate institutionalization and, if necessary, to invest the resources of other social agencies and the committing tribunal in identifying or creating treatment alternatives which will not unduly limit the personal freedom (or the therapeutic prognosis) of the individual facing commitment.

3. Children Facing Commitment on Mental Disability Grounds are Entitled to Substantially the Same Procedural Protections Afforded Adults Under the Due Process Clause.

As noted above, admission/commitment of children to mental institutions involves at least an equivalent degree of deprivation and risk, and is subject to the same

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[21] Glenn, *supra*, at 499-514; Wolfensberger, *The Principle of Normalization in Human Services* (1972); Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Psychiatric Facilities Serving Children and Adolescents*, at 55 (1974). This legal and professional consensus is reflected in the Federal Medicaid regulations governing under-21 inpatient psychiatric services (45 C.F.R. § 249.10(b)(16)(iii), 41 F.R. 2198 (January 14, 1976), and institutional care and treatment of the mentally retarded (45 C.F.R. §§ 249.13(a)(2)(iv), 39 F.R. 2220. 2227 (January 17, 1974)).

[22] The Georgia General Assembly has recognized the necessity of the least restrictive alternative in the juvenile commitment context. See footnote 17, *supra*.

possibility of erroneous or inappropriate diagnosis or placement decisions, as the involuntary commitment of adults. In the instant case, the only asserted basis for denying to such children the procedural protections due adults relates to a somewhat vaguely defined state interest in preserving parental authority and family unity. However, the parents' legitimate concerns can be accommodated without vesting in them and state authorities unfettered control over the institutionalization of children. The asserted state interest cannot justify the deprivation of children's personal liberty without due process of law.

A. The Decisions of This Court Indicate That Parental Authority Is Not Without Limits, and That Children, As Well As Adults, Are Entitled to Constitutional Protections.

This Court has been presented with numerous cases involving the issue of the scope and nature of parental authority in the upbringing of their children, and has generally accorded parents great leeway. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 539 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). However, as important as the result in *Wisconsin* v. *Yoder*, *supra*, was its carefully circumscribed definition of parents' authority as related to denial of their children's opportunity for a free, public secondary school education. *Id.* at 230-234.[23]

The parental authority recognized by this Court has never been absolute, and where a superseding state interest has been demonstrated, this Court has not hesitated to condone intrusion into the parent-child relation-

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[23] Moreover, *Wisconsin* v. *Yoder* turned on First Amendment freedom of religion questions which have no parallel in the instant case.

ship, primarily in a situation where the child's welfare could be jeopardized:

> But the family itself is not beyond regulation in the public interest. . . . Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

At the same time, this Court has recognized that minors are entitled to many of the same constitutional rights and protections that adults enjoy, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), particularly with regard to procedural due process. Minors facing the possibility of institutionalization as a result of delinquent behavior have been accorded almost all the procedural safeguards as adult defendants. See *Breed* v. *Jones*, *supra*; *In re Winship*, *supra*; *In re Gault*, *supra*. Due process protections have even been accorded to students facing suspensions from school of ten days or less. *Goss* v. *Lopez*, *supra*.[24] Against this background, it would be anomalous to hold that procedural due process protections should not apply as well to indefinite commitment of minors to mental institutions.

B. This Court's Abortion Decisions Reflect the Proper Balancing of Interests to Be Applied in the Instant Case.

In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and *Bellotti* v. *Baird*, 428 U.S. 132 (1976), this Court was confronted with the question, *inter alia*, of whether parents could constitutionally prevent their minor daughters from obtaining abortions under circumstances in which, pursuant to *Roe* v. *Wade*,

[24] This Court's ruling in *Ingraham* v. *Wright*, *supra*, does not undercut due process requirements in the context of the present case. See footnote 11, *supra*.

supra, adult women would have an absolute right to terminate unwanted pregnancies.

"Constitutional rights," this Court observed, "do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 74. Given that in some instances, the state's authority to regulate children may be broader than its authority with respect to adults, the Court continued, it is necessary

> to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult.
>
> One suggested interest is the safeguarding of the family unit and of parental authority. [Citation omitted.] It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant. *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 75.

The Court's holding in the *Planned Parenthood* case leads directly to the conclusion that the existence of a conflict between parent and child does not mean the constitutional rights of the child must inevitably give way.

Certainly, a child's interest in avoiding a wrongful, inappropriate, and potentially lifelong commitment to a mental institution is equivalent in gravity and importance to a minor's right to obtain an abortion, and the same balancing of interests is required. So examined, the child's interest in not being improperly institutionalized outweighs the parent's (or guardian's) interest in having absolute (or near-absolute) control over the commitment decision.

Moreover, if the state, *qua* state, cannot institutionalize an individual without proper procedural protections, such authority cannot constitutionally be delegated to a parent or other third party. *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 69.

C. The District Court Properly Accommodated the Interests of the Parent and Child in Requiring Due Process Safeguards.

It must be recalled that the District Court in the instant case did not exclude parents or guardians from participation in the institutionalization decision, but merely required procedural protections such as were already afforded under the state's Juvenile Code, as a check on parental (and professional) authority in this area.

Such a holding is fully consistent with the balancing approach adopted by this Court in the above-cited abortion cases. Concurring in *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, Mr. Justice Stewart and Mr. Justice Powell indicated that the issue might have been different if, instead of a situation where the parent exercised absolute control over the child's decision, the Court were considering a "provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest."

Such a provision, said the concurring opinion, "would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child." *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 91 (Stewart and Powell, JJ., concurring); *cf. Bellotti* v. *Baird*, *supra*, 428 U.S. at 147.

This Court's opinions thus contemplate that in situations such as the case at bar, an acceptable formulation can be achieved which allows for parental involvement to an appropriate extent while preserving the rights of the minor child involved, and which utilizes a neutral body to resolve these different and potentially conflicting interests. The order of the court below does no more and, indeed, could do no less.

D. It Cannot Be Assumed That Parents, Faced With Legitimate Familial Problems, Will Always Act in the Best Interest of Their Children With Regard to Commitment to a Mental Institution.

As found by the court below, parents (or guardians), even with the best of motives, may not act, or be capable of acting, in the best interest of their children in seeking their institutionalization. 412 F.Supp. at 138; A. 765-766. This does not mean that such parents are acting malevolently or punitively, although a small number may do so.[25] What it does mean is that very often the child's

[25] Evidence that parents do not always act in the best interests of their children is best supplied by the examples of child abuse and neglect. The National Center on Child Abuse and Neglect estimates that if comprehensive reporting existed in all jurisdictions, there would be as many as a million reports of abused and neglected childern each year: approximately 200,000 abused and 800,000 neglected. It is estimated that 2,000 children die each year from child abuse and neglect related injuries. Child Abuse and Neglect Statistical Information Sheet, p. 4 (available from HEW's National Center for Child Abuse and Neglect).

problem is part of a larger familial problem, and that the entire family should be treated as a whole rather than isolating one member of the family in an institution. But familial problems may produce such a level of frustration and anxiety that parents are simply incapable of objectively considering the child's interests when they make the critical decision of institutionalization (A. 163-165, 482, 801, 804, 805; "Minors' Right to Due Process," *supra*, 52 Notre Dame Law. at 140-141).

In other words, children are likely to suffer or be blamed for problems that plague the entire family and for situations that require help for the family as a unit, not just for the child. See 412 F.Supp. at 133; A. 163, 371, 482-483, 749, 798-799. This being the case, the District Court rightly concluded, parents should not be in a position to make institutionalization decisions virtually on their own. 412 F.Supp at 138. Nor should they be in a position to waive a child's constitutional rights under such circumstances. 412 F.Supp. at 137, n. 54.

Other courts have also recognized that a child's best interest is not always the motivating factor behind the institutionalization decision. See, e.g., *Heryford* v. *Parker*, *supra*; *Saville* v. *Treadway*, *supra*, 404 F.Supp. at 432; *Horacek* v. *Exon*, *supra*, Order of June 4, 1974; *New York State Association for Retarded Children and Parisi* v. *Rockefeller*, *supra*, 357 F.Supp. at 762; *In re Long*, *supra*; *In re Sippy*, 97 A.2d 455 (D.C. Mun. App. 1953). As the Chief Justice put it several years ago,

> [l]awmakers in recent years have been sensitive to the need to make civil commitment difficult, recognizing the dangers of relatives "farming" out their kindred into mental institutions for motives not always worthy. *Kent* v. *United States*, 401 F.2d 408, 416 n. 4 (1968) (Burger, J., dissenting).[26]

[26] See also testimony of John Paton Filley, Director of Child and Adolescent Mental Health Services, Atlanta Division: "The problem here in part is the history and tradition of mental hospitals which have been dumping grounds in the past" (A. 767-768).

Children, especially those who cannot speak for themselves, must be protected from the risk of such inappropriate and harmful decisions.

E. Claims of Alleged Traumatizing or Disruptive Effects of Due Process Protections for Children Are Not Supported by the Record.

Defendants-appellants contend that a due process hearing prior to institutionalization will have a traumatizing effect on the child or divide and disrupt the family involved (defendants brief, p. 38).[27] However, in proceedings below, experts testified that a hearing may be beneficial for both parent and child (A. 179, 808). Properly administered, a hearing can impart to the child a sense that he is being dealt with fairly. A hearing may also help to relieve parents' anxiety or guilt by removing from them the necessity of making the final decision. Even assuming some unpleasantness or familial discord, it is hard to conceive of these effects as more traumatizing than the effects of indefinite commitment, especially if the institutionalization turns out to be inappropriate or unnecessary. Further, there may be cases where there is little or no family harmony left to preserve and where a hearing will hardly make matters worse. See the above quoted passage from *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 75.

Thus the reasons advanced for preserving a system in which the child's interests are not assured of representation cannot be supported on the basis of the record in this case, and, even on their face, do not justify the risk of inappropriate or unnecessary institutionalization.

[27] It should be remembered, again, that a formal hearing will not necessarily be held in every case as a result of the District Court's decision.

CONCLUSION

For the reasons set forth above, the American Bar Association urges this Court to affirm the judgment and decree of the District Court.

Respectfully submitted,

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APPENDIX

APPENDIX

ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION

*Standards Relating to Trial Courts.**

2.72 Proceedings Concerning Involuntary Care and Treatment.

In civil proceedings for commitment of the mentally ill, and in all other proceedings in which a disposition of a person may be made on account of his mental or physical condition, the court should ensure that the disposition is made on the basis of adequate information, in accordance with applicable law, and with due regard for the rights of the individual and of the public.

(a) *Procedural Requirements.*

(1) The person who is subject to the proceeding and his family or others immediately concerned for his welfare should be given adequate notice and an opportunity to be heard.

(2) The court should formulate clearly the issues to be resolved, with particular regard for the matters to be considered in the course of medical, psychological, or psychiatric examination and to be made the subject of expert testimony.

(3) Clinical evaluation should be made by professionally qualified persons on the basis of examination and other diagnostic procedures that conform to professionally recognized standards. The person who is the subject of the proceeding should be entitled to obtain and present such an evaluation on his own behalf, at public expense if he lacks the means to obtain it himself. Examiners

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* Draft approved at February, 1976, mid-year meeting.

should be required to testify as to the extent of their examination and the grounds for their conclusions. Except on stipulation of both parties, the testimony of all witnesses, including expert witnesses, should be presented in open court, subject to cross-examination, and included in the record of the proceeding.

(4) The person subject to the proceeding should be entitled to the assistance of counsel as provided in Section 2.20.

(5) In exercising its power to order care and treatment, the court should consider possible alternative dispositions, imposing only as much restraint as is necessary for protection of the individual, his family, or the public, or for accomplishment of required treatment.

(6) When commitment is ordered, the court should specify its purposes, the terms and conditions of any custody or restraint that may be directed, and a time limit, upon the expiration of which the matter is to be brought before the court for further consideration unless the person has been discharged prior to that time according to law.

(7) Whenever a person is found to be mentally ill or mentally retarded or is committed to an institution where he may be unable to take an active part in management of his property or business interests, and it appears that the commitment may be of long duration, the court should inquire into the nature of such interests and the possibility that guardianship of his property or like safeguards should be established to protect them.

(8) Observational commitments. Involuntary commitments for the purposes of observing the individual's mental or physical condition should be to the least restrictive environment in which the observation can be conducted and only for that period of time which is reasonably necessary to complete such observation.

(9) Emergency commitments. Emergency commitments without judicial proceedings should be permitted only in cases of extreme physical danger to human life, health, or safety, and should not be continued beyond the time reasonably necessary to arrange for a preliminary hearing before a judge.

(b) *Staff Assistance.* The court should have sufficient supporting staff and access to psychiatrists and other professionally qualified experts to carry out its responsibilities under this Section.

COMMENTARY

In recent years the traditional procedures for civil commitment of the mentally impaired, and procedures involving defendants in criminal cases who plead insanity or whose competence to stand trial is in question, have been augmented by an array of statutory procedures for commitment of narcotics addicts, alcoholics, and persons manifesting such types of statutorily defined social deviance as "sexual psychopathy" and "defective delinquency." Because these proceedings are generally termed civil rather than criminal, even when they arise out of criminal prosecution, fewer procedural protections are generally afforded the persons subject to them. The distinction between civil and criminal in many of these cases, however, is more apparent than real. Commitment to an institution on the ground of mental or physical condition is a deprivation of liberty and has many of the characteristics of penal sanctions: confinement (often under harsh conditions), isolation from family and friends, inability to earn a living, persisting social stigma, and sometimes loss of civil and professional rights. Like criminal prosecution, it is often the result of an alleged offense against the law or mores of the community. Procedural safeguards in these cases should not depend on mechanical application of a dichotomy between civil and criminal procedures.

The role of the court in commitment and related procedures should be clearly understood as including responsibility for determining the legal and factual issues that may be presented. The court should not simply ratify recommendations of medical examiners on the assumption that the question is one of medical diagnosis. Statutory definitions of the classes of persons subject to these proceedings do not necessarily correspond to any generally accepted medical diagnostic category. Moreover, psychiatric diagnosis by one diagnostician may differ greatly from that by another who is equally well qualified, and may sometimes be influenced by irrelevant or insubstantial therapeutic, social, or institutional considerations. The lack of precise criteria for determining the potential dangerousness of an individual should be taken into account, as should the tendency of medical witnesses to overpredict dangerous behavior. The medical expert must provide the court with the medical facts and medical opinions essential to a decision, including diagnosis, prognosis, suitability of proposed treatment, prospect of improvement under possible alternative dispositions, and the like. However, the ultimate decision is not essentially a medical one and involves a substantial element of legal discretion. The special problems encountered in these cases make it desirable that judges have been prepared by experience or training for their role. [Reference omitted.]

Notice and an opportunity to be heard should be provided even though the person subject to the proceeding appears to be mentally incapable of acting upon them. Notice may be delivered by a social worker or other trained person acting on behalf of the court who can explain its meaning and offer assistance in obtaining counsel and making preparations for the hearing. Notice of the hearing should also be given to relatives or friends who may assist the respondent or act in his behalf. Notice should be given sufficiently in advance of scheduled

court proceedings to afford a reasonable opportunity for preparation, and should inform the person with particularity of the basis for his detention, his right to counsel and to trial by jury (where available) and the standard upon which he may be detained.

The person who is subject to commitment should be personally present, except where the court finds that he is incapable of attending the hearing or that attending the hearing would worsen his condition or might incite him to injure someone else as a result of hearing the testimony. He should in any event be represented by counsel. See Section 2.20.

Where the respondent is in such a condition that he cannot be present at the hearing, a conference with the judge may allow him to state his case without being required to be present at the formal hearing, but such a conference should not take the place of an evidentiary hearing. Disposition should be made only upon a hearing at which medical and other witnesses are present and subject to cross-examination by counsel and questioning by the court unless the parties agree to presentation on the basis of written documents. Hearings should be on a formal record and decisions based on written findings of facts.

Hearings under sex-psychopath and similar quasi-criminal statutes should provide all the procedural safeguards of a criminal trial. In cases where determination of mental condition is related to criminal proceedings, a separate hearing should be held on mental condition, with adequate notice to the defendant of the questions at issue and the possible consequences of the determination.

The usefulness of medical reports and testimony can often be greatly improved if the court advises examiners and witnesses in advance of the kinds of information it requires for an informed decision. This can be done

through examination forms stating the legal questions before the court (for example, whether the individual is competent to stand trial), and indicating the facts required for a finding on the question at issue (for example, whether he could cooperate with counsel in his own defense). Examiners should be required to state the nature and extent of their examination and the grounds on which they base their findings and conclusions.

Counsel for the respondent should be afforded sufficient time and resources to consult with his client, secure independent professional examination if desired, and inform himself about possible alternatives to commitment. Special training for counsel in mental illness cases can be helpful in improving the quality of representation.

In reaching a disposition, courts should consider all reasonable alternatives such as voluntary hospitalization and treatment in the community without full-time hospitalization. Dispositions should provide for the minimum amount of restraint consistent with accomplishing the purposes of the law.

Commitments should be limited to a relatively short period, at the end of which the necessity of further commitment should be judicially determined. Periodic review of the status of committed persons should be initiated by the court unless a public guardian or defender agency can assume responsibility for doing so. The review should involve notice and formal hearing, with the respondent represented by counsel and medical witnesses subject to cross-examination as in the original commitment proceeding. All reasonable alternatives to commitment should again be considered, and a realistic assessment made of the likelihood of accomplishing further therapeutic objectives by commitment.